No. 97-1210

IN THE

Supreme Court of The United States

OCTOBER TERM, 1997

BLUE CROSS AND BLUE SHIELD OF MICHIGAN,
Petitioner,

v.

BPS CLINICAL LABORATORIES, *et. al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Michigan

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE MICHIGAN MANUFACTURERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITION

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Michigan Manufacturers' Association ("MMA") respectfully moves the Court for leave to file the following brief *amicus curiae* in support of the petition for certiorari. Counsel for Petitioner has consented to the filing of this brief. Respondent's attorney, who initially indicated that he would consent, now states that he no longer represents Respondent and does not know who represents Respondent. Accordingly, MMA has been unable to obtain Respondent's consent to file this petition.

The interest of the MMA in this case arises from its activity representing the interests of Michigan employers and the public generally in the administration of laws affecting employers and employees. The MMA is a business association comprised of more than 4,000 private businesses employing more than 90% of the industrial workforce in Michigan. The MMA is submitting this brief *amicus curiae* to alert the Court to the broad significance of the ERISA

preemption issue raised in the pending petition for writ of certiorari.

In light of this Court's strong interest in articulating a workable test for ERISA preemption, and in light of the importance of the issues raised in the petition, the MMA respectfully requests that its arguments in support of granting the petition for writ of certiorari be heard.

Respectfully submitted,

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Dated: February 20, 1998

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INTEREST OF THE AMICUS CURIAE

Michigan Manufacturers Association ("MMA") is a business association composed of private Michigan employers, organized and existing to study matters of interest to its members, promote the interests of Michigan employers and of the public generally in the proper administration of laws relating to its members, and otherwise promote the general business and economic welfare of the State of Michigan. MMA represents the interests of its member-employers in significant matters before the courts, the U.S. Congress, the Michigan Legislature, and State agencies. MMA appears before this Court as a representative of more than 4,000 private businesses employing more than 90% of the industrial workforce in Michigan, over 1,000,000 employees, many of whom are substantially affected by the

ERISA preemption issues presently before this Court. MMA is also an employer and has an interest in this case both as an employer and as a representative of employers.

The MMA submits this brief as *amicus curiae* in support of the petition for writ of certiorari in order to alert the Court to the broad significance of this dispute.[1]

PRELIMINARY STATEMENT

The paramount issue in this case is whether state law can control the structure, benefits, and administration of an employer-sponsored, self-funded employee health plan in spite of Congress's express provision that the Employee Retirement Income Security Act ("ERISA") preempts state law that relates to such plans.

The extent to which state law can regulate contractual arrangements (also known as "preferred provider" or "managed care" agreements) between health care providers and benefit plans has wide-ranging impact on employer-sponsored health care throughout the United States. In 1997, 85% of all U.S. employees were covered by some form of managed health care, while only 15% of all active employees retained traditional indemnity health plans. *Health Costs Stay Flat as Managed Care Gains Ground*, Best's News, Jan. 22, 1998 (citing *12th Annual Mercer/Foster Higgins National Survey of Employer-Sponsored Health Plans*, William M. Mercer, Inc., 1998). In December of 1997, the National Association of Insurance Commissioners issued a paper asserting that states have the authority to regulate all manner of managed care entities and urging states to enact regulations to encompass provider-sponsored organizations and plans alike. *The Regulation of Health Risk-Bearing Entities*, National Association of Insurance Commissioners, 1997. The

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[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of this brief.

Commissioners note that most states have enacted some version of a health maintenance organization statute or regulation, although regulations vary widely from state to state. *Id.* at I-17- I-24. This trend is likely to continue, as state insurance commissioners take the position that medical providers who accept capitated payments directly from employer-sponsored plans are engaging in the business of insurance. Robert C. Feightner, *State Regulation of Capitated Reimbursement for Physician-Hospital Organizations*, 7 Health Matrix 301 (1997).

The state laws at issue here, Michigan's Non-Profit Health Care Corporation Reform Act, MICH. COMP. LAWS ANN. § 550.1101 *et seq.*, and Prudent Purchaser Act, MICH. COMP. LAWS ANN. § 550.51, represent Michigan's response to the rise of contractual agreements between health service providers and health benefit plans. These Michigan laws are broadly drafted to allow the Insurance Commissioner to control not only insured health care, which Congress expressly allows under ERISA's insurance savings clause, but also to control many self-funded plans, which Congress intended to prohibit by providing that plans could not be "deemed" insurers.

The plan at issue in this case, the General Motors Corporation and United Automobile Workers Association Premier PLUS program ("Plan"), relied on a service agreement with six laboratories which agreed to discount the rate charged to the Plan for laboratory services. *BPS Clinical Lab. v. Blue Cross Blue Shield of Michigan*, 522 N.W.2d 902, 904 (1994). Physicians received a small financial incentive ($3.00) for each blood specimen referred to these six laboratories, and the Plan paid the agreed-upon discounted fee for the work done by these laboratories. *Id.* The Plan paid other laboratories only 50% of the maximum payment schedule for similar services. *Id.*

Laboratories who were not parties to the service agreement and physicians who did not refer specimens to the

six preferred laboratories sued the Plan Administrator,[2] raising state law claims of tortious interference, antitrust, breach of contract, and violation of Prudent Purchaser Act. *Id.* The Plan Administrator attempted to remove the case to Federal District Court on the grounds of ERISA preemption, but the District Court remanded the case to state court, where the trial court refused to consider the issue of ERISA preemption and held that the Prudent Provider Act had been violated. *Id.* The trial court ordered the Plan Administrator to follow the state law requirements for health service contracts, including submitting the Plan's laboratory agreement to Michigan's Insurance Commissioner for approval and reconsidering the Plaintiffs' applications for participation in the laboratory agreement under the guidelines of the Prudent Provider Act. *Id.* at 905. The trial court enjoined the Plan from operation until it satisfied the state's requirements under the Prudent Provider Act. *Id.*

The Plan Administrator appealed, and the Michigan Court of Appeals reversed the trial court, holding that ERISA preempted the Plaintiffs' state law claims and prevented the state from imposing regulations on the self-funded Plan. *Id.* at 906. The Michigan Court of Appeals held that applying the Prudent Provider Act would alter the way the Plan was administered, affect benefits paid under the Plan, increase costs, and impair the ability of the Plan to function simultaneously in different states. *Id.* at 906-907. The Michigan Court of Appeals also held that the state laws could not be saved from preemption under ERISA's insurance savings clause because the Plan was not insured, but was self-funded. *Id.* at 907.

The Plaintiffs applied for leave to appeal to the Michigan Supreme Court, and in lieu of granting leave to appeal, the

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[2] The Plan is administered by Blue Cross and Blue Shield of Michigan, which provides only claims administration and is not an insurer of Plan benefits or Plan beneficiaries.

Michigan Supreme Court remanded the case to the Michigan Court of Appeals for reconsideration in light of this Court's opinion in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U. S. 645 (1995). *See BPS Clinical Lab. v. Blue Cross Blue Shield of Michigan*, 535 N.W.2d 793 (1995)(Table).

On reconsideration, the Michigan Court of Appeals abruptly changed its position and declared that *Travelers* required the court to "repudiate our prior decision and hold that the ERISA does not preempt plaintiffs' claims under state law." *BPS Clinical Lab. v. Blue Cross Blue Shield of Michigan*, 552 N.W.2d 919, 922 (1996). The Michigan Court of Appeals determined that the Prudent Purchaser Act was not preempted "[b]ecause the [Prudent Purchaser Act] does not mandate that any party enter into a prudent purchaser agreement" and "only imposed certain requirements once defendant chose to form prudent purchaser agreements." *Id.* at 923. The Michigan Court of Appeals believed that "[t]he fact that the ERISA does not address the relationship of a benefit plan with health care providers" supported its conclusion, declaring that "[b]ecause we do not agree that Congress intended to preempt state law where no federal regulation exists to replace it, we find that none of plaintiffs' claims are preempted by ERISA." *Id.* at 924.

The Plan Administrator sought leave to appeal to the Michigan Supreme Court, but leave was denied. The Plan Administrator now petitions this Court to grant a writ of certiorari to the Supreme Court and Court of Appeals of the State of Michigan.

REASONS FOR GRANTING THE PETITION.

I. This Court should grant certiorari to halt encroaching state regulation which threatens the national administration of self-funded employee welfare benefit plans.

ERISA's preemption clause provides that ERISA "shall supersede any and all State laws insofar as they may . . . relate to any employee benefit plan[.]" 29 U.S.C. § 1144(a); ERISA § 514(a). The "basic thrust of [ERISA's] pre-emption clause . . .[is] to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U. S. 645, 655-58 (1995).

Most states have implemented some type of "any willing provider" law, many demanding that benefit plans be written and administered according to various different schemes for protecting the business interests of "any willing" health service provider. These laws create several different regulatory schemes, destroying the national employer's ability to implement uniform plan benefits and administration.[3]

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[3] These laws include: ALA. CODE § 27-1-19 (Michie 1996); ARK. CODE ANN. § 23-99-203 (1997); CONN. GEN. STAT. § 38a-553 (1997); FLA. STAT. ch. 627.6471 (1997); GA. CODE ANN. § 33-30-20 (1997) *et seq.*; IDAHO CODE § 41-3927 (1996); ILL. REV. STAT. ch. 215, para. 370j (1997); IND. CODE ANN. § 27-8-11-3.1 (West 1997); IOWA CODE ANN. § 514F.2 (West 1997); KY. REV. STAT. ANN. § 304.17A-300 (Baldwin 1997); LA. REV. STAT. ANN. § 40:2203 (West 1997); ME. REV. STAT. ANN. tit. 24-A § 2672 (West 1997); MD. CODE ANN., Ins. § 14-205 (1997); MASS. GEN. L. ch. 176A § 1A (1997); MICH. COMP. LAWS ANN. § 550.1502 (West 1997); MINN. STAT. ANN. § 62N.01 (West 1995); MISS. CODE ANN. § 83-41-335 (1997); MONT. CODE ANN. § 33-22-1704 (1997); NEB. REV. STAT. § 44-4109 (1996); NEV. REV. STAT. § 689B.061 (1995); N.H. REV. STAT. ANN. § 420-C:1 (1996); N.M. STAT. ANN. § 59A-22A-2 (1997) *et seq.*; N.Y. WORK. COMP. LAW 350 (McKinney 1997) *et seq.*; N.C. GEN. STAT. § 58-50-56 (Michie 1997) *et seq.*; N.D. CENT. CODE § 26.1-47-02 (Michie 1997); 40 PA. CONS. STAT. § 764a (1998); TEX. INS.

Until this Court determines whether ERISA preempts state preferred provider regulations, the lower courts will be confronted with a multitude of preemption cases under a myriad of different state laws, increasing the possibility of inconsistent and confusing rulings on this important issue.

II. This Court should grant certiorari to correct the aberrant minority decisions which conflict with the majority of decisions on ERISA preemption.

Federal courts have determined that laws of Virginia, Louisiana, Texas, Alabama, Arkansas, and Washington which are similar to Michigan's Prudent Provider Act "relate to" employer-sponsored benefit plans in such a manner that they are preempted by ERISA.[4]

A minority of courts take the position that state laws regulating preferred provider networks are too tenuous and remote from a plan to be preempted by ERISA. *Napoletano v. Cigna Healthcare of Connecticut, Inc.*, 680 A.2d 127

CODE ANN. Art. 21.52D (West 1997); UTAH CODE ANN. § 31A-22-617 (Michie 1997); VA. CODE ANN. § 38.2-4209 (Michie 1997); WIS. STAT. § 609.001 (1997) *et seq.*; WYO. STAT. § 26-22-503 (1997).

[4] *Stuart Circle Hosp. Corp. v. Aetna Health Management*, 995 F.2d 500 (4th Cir. 1993) (ERISA preempts Virginia statute relating to preferred provider organizations); *Cigna Healthplan of Louisiana v. State of Louisiana, Ex Rel. Ieyoub*, 82 F.3d 642 (5th Cir. 1996) ("any willing provider" statute regulating preferred provider contracts relates to plan and would be preempted but for ERISA's insurance savings clause); *Texas Pharmacy Ass'n v. The Prudential Ins. Co. of America*, 105 F.3d 1035 (5th Cir. 1997) (ERISA preempts Texas "any willing provider" statute regulating preferred provider organizations); *Blue Cross and Blue Shield of Alabama v. Nielsen*, 917 F. Supp. 1532 (N.D. Ala. 1996) (ERISA preempts Alabama statutes requiring that non-contracting providers be compensated at the same rate as contracting providers and prohibiting employee benefit plan from denying pharmacy's request to become contracting provider); *The Prudential Ins. Co. of America v. Nat'l Park Medical Center, Inc.*, 964 F. Supp. 1285 (E.D. Ark. 1997) (ERISA preempts Arkansas "Patient Protection Act"); *Washington Physicians Services Ass'n v. Gregoire*, 967 F. Supp. 424 (W.D. Wash. 1997) (ERISA preempts Washington state law directing health plans to reimburse health care providers for all types of licensed care).

(1996) (ERISA does not preempt Connecticut law requiring health plans with preferred provider networks to file list of participating providers and selection criteria with state insurance commissioner); *American Drug Stores, Inc. v. Harvard Pilgrim Health Care*, 973 F. Supp. 60 (D. Mass. 1997) (ERISA does not preempt Massachusetts "any willing provider" statute).

The Michigan Court of Appeals decision in this case is one of the aberrant minority. This Court should grant certiorari to expeditiously resolve the conflict created by Michigan's misapplication of the doctrine of ERISA preemption.

III. This Court should grant certiorari to reinforce the principle that the core purpose of ERISA preemption is to protect employee benefit plans from state interference with benefits and administration.

The Michigan laws at issue here would alter the Plan's structure by prohibiting it from offering benefits in the manner which the Plan has selected and by requiring the Plan to comply with Michigan laws controlling the use of service providers. This Court has repeatedly held that ERISA preempts state laws which alter the fundamental structure of a benefit plan. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U. S. 504, 524-25 (1981) (ERISA preempts state law which eliminates one method of calculating benefits by prohibiting plan from offsetting workers' compensation benefits); *Shaw v. Delta Air Lines, Inc.*, 463 U. S. 85 (1983) (ERISA preempts state law requiring plan to provide pregnancy benefits); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U. S. 724 (1985) (ERISA preempts state law requiring plan to include minimum mental health benefits); *FMC Corp. v. Holliday*, 498 U. S. 52 (1990) (ERISA preempts state antisubrogation law which interferes with calculation of benefits); *District of Columbia v. Greater Washington Board of Trade*, 506 U. S. 125 (1992) (ERISA preempts workers compensation law prohibiting termination of health benefits to employees

receiving workers compensation); *Boggs v. Boggs*, __ U. S. __, 117 S.Ct. 1754 (1997) (ERISA preempts state law regarding testamentary transfer which alters to whom plan benefits would be paid).

Until recently, employers have relied upon the stability provided by ERISA preemption in creating their self-funded welfare benefit plans, confident that the state could not alter their plan benefits or plan administration. The majority of federal courts bolstered this confidence by holding that ERISA preempts state laws which prohibit plans from contracting with providers outside of arrangements approved by state law.[5]

The Michigan decision, declaring that ERISA preemption does not apply to state "any willing provider" laws, introduces chaos into an area which was considered settled ERISA law. Allowing the Michigan Court of Appeals' decision to stand threatens to disrupt the stability of employers' self-funded plans. Accordingly, this Court should grant certiorari to reinforce the core principle of ERISA preemption--that a state cannot directly interfere with the terms of a benefit plan or its administration--upon which the majority of self-funded benefit plans rely.

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[5] *Texas Pharmacy Ass'n*, 105 F.3d at 1037 (ERISA preempts Texas law which prohibits plans from contracting with pharmacy networks that exclude any willing provider);*Cigna Healthplan*, 82 F.3d at 645 (ERISA preempts Louisiana law which prohibits plan from refusing "any willing provider"); *Stuart Hosp.*, 995 F.2d at 501 (ERISA preemption applies to Virginia law which requires insured plan to include any willing provider, although law saved by insurance savings clause); *Washington Physicians Serv. Ass'n*, 967 F. Supp. at 426 (ERISA preempts Washington law which mandates that health plans reimburse all state-certified health care providers); *Nat'l Park Medical Center, Inc.*, 964 F. Supp. at 1295-1300 (ERISA preempts Arkansas law which prohibits health plans from imposing a monetary advantage or disadvantage for use of specific providers).

CONCLUSION

Because the questions raised by the petition present difficult issues of major significance to industry in this county, the Michigan Manufacturers Association urges the Court to grant the petition for writ of certiorari.

Respectfully submitted,

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